

April 11, 2005

Civil Division-Kent County (739-7641)

Mr. Robert I. Hicks, Jr.
203 Aspen Drive
Newark, DE 19702

Re: **Freedom of Information Act Complaint
Against New Castle County Council**

Dear Mr. Hicks:

Our Office received your complaint dated February 25, 2005 alleging that the New Castle County Council (“the Council”) violated the Delaware Freedom of Information Act, 29 Del. C. Chapter 100 (“FOIA”), the New Castle County Employee Protection Act, and the Delaware Whistleblower’s Act.

By letter dated February 28, 2005, State Solicitor Malcolm S. Cobin, Esquire advised you that “[t]his office is without authority to bring an action under either the Delaware Whistleblowers’ Protection Act, 19 *Del. C.* Ch. 17 or the New Castle County Employee Protection Act, New Castle County Code §2.03.300.”

Our Office has authority under Section 10005 of FOIA to investigate your allegations that the Council violated FOIA. You make two allegations: (1) the Council met on January 25, 2005 without noticing the special meeting to the public as required by FOIA; and (2) “prior to the

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January 25 special meeting,” there were “a series of individual meetings with Council Members, with the expressed objective of garnering commitment for individual Council member votes, to remove the county auditor.”

We have already addressed the first issue raised in your FOIA complaint in response to a complaint made prior to yours by Mr. John Flaherty of Common Cause. *See Atty’y Gen. Op. 05-IB09* (April 11, 2005). Enclosed is a copy of that opinion.

By letter dated March 2, 2005, we asked the Council to respond to the second issue in your FOIA complaint within ten days. We granted the request of the Council’s attorney for a short extension of time, and received the Council’s response on March 17, 2005.

The Council denies that it violated the open meeting requirements of FOIA. According to the Council, the Council President “called the January 25, 2005 public meeting, he did not meet simultaneously with a quorum of Council prior to the January 25th public meeting to discuss the Auditor’s position, he did not attempt to secure a consensus before the public meeting on the issue of the Auditor, and he was not solicited by a series of Council members for a particular vote prior to the public meeting.”

Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session as authorized by statute. 29 Del. C. §10004(a).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking legal action on public business.” 29 Del. C. §10002(e). FOIA defines “public business” as “any matter over which the public body has

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supervision, control, jurisdiction or advisory power.” Id. §10002(b).

Legal Authority

You allege that prior to the January 25, 2005 special meeting of the Council, a quorum of the Council members discussed whether to terminate your services as County Auditor. You did not provide us with the names of individual Council members who allegedly met, or the date(s) or time(s) or place(s) where they allegedly met, or the manner in which they met (in person, electronically).

Your complaint raises an important issue of the proper allocation of the burden of proof in a FOIA investigation by our Office which we have not had occasion to address before.

In civil litigation, the plaintiff always bears the burden of proof. In some types of cases, the law only requires the plaintiff to prove sufficient evidence to establish a *prima facie* case, then shifts the burden of going forward with evidence to the defendant. The ultimate burden of proof, however, always remains on the plaintiff.

Under FOIA, for reasons of public policy the legislature has shifted the burden of proof to the public body. Section 10005(c) provides: “In any action brought under this section, the burden of proof shall be on the custodian of the records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.” 29 Del. C. §10005(c).

With regard to public records, “[t]his allocation of the burden of proof underscores the basic public policy that . . . the plaintiff asserting a freedom of information claim has a disadvantage

because only the public body holding the information can speak confidently regarding the nature of the material and the circumstances of its preparation and use which might support an exemption defense.” Guy v. Judicial Nominating Commission, 659 A.2d 777, 781 (Del. Super. 1995) (Ridgely, Pres. J.). Similarly, it would be unfair to require a citizen to prove that a public body met in executive session for a purpose not authorized by law because the members of the public body “are they only ones who would know” what was discussed “since all other uninvited persons were excluded.” The News-Journal Co. v. McLaughlin, 377 A.2d 358, 362 (Del. Ch. 1977) (Brown, V.C.).

FOIA also provides that in civil litigation a public body bears the burden “to justify . . . any failure to comply with this chapter.” We read that language to mean that there may be extenuating or mitigating circumstances why the public body did not comply with FOIA. Such evidence does not disprove that a violation occurred, but may have “a bearing on the extent of any relief to be granted.” McLaughlin, 377 A.2d at 362.

We do not read Section 10005(c) of FOIA to place the burden on a public body to prove that a meeting did not in fact take place. It would be unfair to require any party to prove a negative. We follow the lead of the courts in other states which have held that a plaintiff must make at least a *prima facie* showing that a meeting occurred. “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.” *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993). “[O]nce a plaintiff has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter, the burden then shifts to the defendants to prove that no violation of the Open Meetings Law occurred.” *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. App. 1989).

In two previous opinions, the complainant provided us with some evidence that a public body may have met, and we were able to substantiate that a meeting occurred through our investigation. For example, in *Att'y Gen. Op.* 03-IB11 (May 19, 2003), we had copies of e-mails between the three members of a nominating committee over a two-day period which resulted in a consensus of names to submit to the city council. In *Att'y Gen. Op.* 04-IB17 (Oct. 18, 2004), you provided us with a memorandum stating that a council member spoke by telephone with other members of the Council about a \$15 million loan to the City of Wilmington and reached a "consensus" on the issue before holding a public meeting to discuss the matter. Our investigation substantiated that four members of the Council (a quorum) discussed the matter in a series of one-on-one telephone calls. We determined that amounted to a meeting in violation of FOIA.

For this complaint, you did not provide us with any information to establish a *prima facie* case that a quorum of the Council met outside of public view to discuss the termination of your services as County Auditor. The Council has provided us with a sworn affidavit from Paul G. Clark, the President of the Council, who states: "At no time prior to the January 25, 2005 special meeting did I lobby or otherwise solicit a quorum of Council for a consensus vote regarding the Auditor. At no time prior to the January 25, 2005 special meeting was I lobbied or solicited to support or oppose a position on the Auditor by a series of Council members."

Without some *prima facie* evidence to doubt or question those sworn statements, we do not believe that there is sufficient evidence in the record to support your claim that a quorum of the Council met privately sometime prior to the January 5, 2005 special meeting to discuss whether to continue your services as County Auditor.

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Conclusion

For the foregoing reasons, we determine that the Council did not violate the open meeting requirements of FOIA by meeting without notice to the public prior to the January 25, 2005 special meeting to discuss the public business of whether to terminate your services as County Auditor.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin
State Solicitor

cc: The Honorable M. Jane Brady

Lawrence W. Lewis, Esquire
Deputy Attorney General

Leonard E. Collins, Jr., Esquire

Phillip G. Johnson
Opinion Coordinator